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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF OREGON  
7 PORTLAND DIVISION  
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9 UNITED STATES OF AMERICA,

No. 3:11-cv-00227-HU

10 Plaintiff,

OPINION AND ORDER

11 v.

12 THE TUG SUNDIAL (Vessel ID No.  
13 652357), *in rem*, BARGE 166, *in*  
14 *rem*, BARGE 71, *in rem*, THE  
15 PIONEER, *in rem*, their apparel,  
tackle and appurtenances; BANK  
OF AMERICA NA, *in personam*; and  
16 TIDEWATER BARGE LINES, INC.,  
*in personam*,

17 Defendants.  
18

Ron Silver  
19 United States Attorneys Office  
1000 S.W. Third Avenue, Suite 600  
20 Portland, OR 97204-2902  
Eric Kaufman-Cohen  
21 Torts Branch, Civil Division  
450 Golden Gate Avenue, Room 7-5395  
22 San Francisco, CA 94102-3463

23 Of Attorneys for Plaintiff

24 Daniel F. Knox  
Noah Jarrett  
25 William J. Ohle  
David R. Boyajian  
26 Schwabe, Williamson & Wyatt, P.C.  
1211 SW 5th Ave., Suite 1900  
27 Portland, OR 97204

28 Of Attorneys for Defendants

1 HUBEL, J.,

2 The United States of America ("the Government") brought this  
3 suit in admiralty against Tidewater Barge Lines, Inc.  
4 ("Tidewater"), the tug SUNDIAL, grain barges 166 and 71, and the  
5 fuel barge PIONEER to recover the cost of repairs to a lock and  
6 gate on the Columbia River that were damaged after an allision with  
7 a flotilla of barges propelled by the tug SUNDIAL. Now before the  
8 Court is the Government's motion to compel production of all  
9 documents regarding any investigation conducted by, or on behalf  
10 of, Tidewater into the incident giving rise to this litigation. For  
11 the reasons stated herein, I DENY the Government's motion (Docket  
12 No. 73) to compel.

13 **ANALYSIS**

14 The Court will only briefly summarize here the facts relevant  
15 to the instant motion. Tidewater is a member of The American  
16 Waterways Operators Responsible Carrier Program ("RCP"). Although  
17 the RCP is a voluntary program, carrier members must remain in  
18 audited compliance with the RCP or their membership will be  
19 terminated. In accordance with the RCP, Tidewater adheres to an  
20 incident investigation procedure when accidents occur in order to  
21 "identify immediate and underlying causes, so that steps can be  
22 taken to prevent recurrences." (Kaufman-Cohen Decl. Ex. F at 2.)  
23 According to Tidewater's safety manual, typically two levels of  
24 reports should be produced: "An Initial Incident Report (SEQ-006)  
25 form will be submitted prior to a more detailed Incident Detail  
26 Report (SEQ-001)." (*Id.*) The question at the heart of this  
27 discovery dispute is whether Tidewater ever produced an Incident  
28

1 Detail Report because the Government has only received the former,  
2 not the latter.

3 Tidewater claims that the two reports were essentially  
4 collapsed into one "more-detailed-than-usual" Initial Incident  
5 Report "which included all the elements of a typical" Incident  
6 Detail Report. (Defs.' Resp. Pl.'s Mot. Compel at 4.) And this  
7 single incident report has already been produced by Tidewater  
8 during the course of discovery. The Government, on the other hand,  
9 seems to suggest that an Initial Detail report does exist and is  
10 cloaked as a TapRoot analysis on Tidewater's privilege log.

11 On February 29, 2008, the day after the allision which gave  
12 rise to this litigation, Tidewater's counsel suggested the use of  
13 the TapRoot analytic system (i.e., software used by companies to  
14 investigate and fix the root causes of major accidents) "in order  
15 to prepare for the claim that Tidewater recognized was sure to  
16 come." (Defs.' Resp. Pl.'s Mot. Compel at 7.) Ultimately, an  
17 investigation team was formulated, which was to be led by  
18 Tidewater's counsel, Daniel Knox. Knox also hired a consultant,  
19 Kevin McManus, in order to help facilitate and implement the  
20 TapRoot system and software. Because "no remotely similar  
21 investigative effort ha[d] been made in Tidewater's history," the  
22 formation of the TapRoot team "was unprecedented." (Defs.' Resp.  
23 Pl.'s Mot. Compel at 8.) Over the next several months, the TapRoot  
24 team compiled the necessary background information and conducted  
25 the TapRoot analysis. Initial conclusions were provided to  
26 Tidewater's President, Dennis McVicker, in March 2008. Since then,  
27 a second round of TapRoot inquiries were addressed by the TapRoot  
28 investigative team over the next year.

1       Upon review, I conclude that any document produced during the  
2 course of the TapRoot investigation is protected by the work-  
3 product doctrine. *See United States v. Richey*, 632 559, 567 (9th  
4 Cir. 2011). This conclusion is bolstered by the fact that (1)  
5 Tidewater had never used the TapRoot software prior to Knox  
6 recommending its use on February 29, 2008; and (2) the TapRoot  
7 investigation goes well beyond what the RCP requires of a carrier  
8 in good standing. Accordingly, the Government's motion (Docket No.  
9 73) to compel is **DENIED**.

10       As an aside, I must address the fourth entry in Tidewater's  
11 privilege log. This entry originally identified "various"  
12 statements by employees that Tidewater claimed were solicited at  
13 the direction of counsel and drafted by "various employees" on  
14 "various" dates. (Kaufman-Cohen Decl. Ex. C at 1.) Because the  
15 Government took exception with the fourth entry's lack of clarity  
16 in its moving papers, I addressed the matter with Tidewater's  
17 counsel during the August 2, 2012 hearing on the Government's  
18 motion to compel. The following discussion ensued:

19       THE COURT: What [about] the complaint the plaintiff has  
20 with the detail of the privilege log where you are  
21 alleged to have identified, in kind of a blanket fashion,  
22 several employees on several dates were interviewed  
23 regarding several statements or several facts? Shouldn't  
24 there be more detail than that?

25       MR KNOX: . . . I'll happily identify the individuals I  
26 have -- that we interviewed. I'll tell you right now,  
27 [the list includes] the four members of the crew of the  
28 Sundial, all of whom have been deposed at great length by  
the government.

THE COURT: Well, at a minimum, I'll require that you  
amend your privilege log to indicate which people were  
interviewed on what date and who was present during the  
interview.

MR. KNOX: I'll be happy to do that, Your Honor.

1 (Mot. Compel Hr'g Tr. 19-20, Aug. 2, 2012.)

2 Four days later, on August 6, 2012, Tidewater provided the  
3 Government with a third amended privilege log. The fourth entry in  
4 Tidewater's third amended privilege log has a document date of  
5 "7/24/2008-4/14/2009" and is described as "20 written statements by  
6 ten operators dated between January 31, 2009 and April 14, 2009  
7 regarding the employees' experiences with locks on the Columbia  
8 River . . . and 23 statements by 23 members of the Tidewater crew  
9 (operators and deck mechanics) regarding their experience with  
10 mooring lines." (Defs.' Third Am. Privilege Log at 2.)

11 Since the fourth entry in Tidewater's third amended privilege  
12 log is still too broad and does not set forth the specifics that  
13 Tidewater's counsel said he would be "happy" to provide, I am  
14 ordering Tidewater to amend its privilege log for a fourth time.  
15 Within the fourth entry, Tidewater must provide the name of each  
16 individual who provided a statement, the date the statement was  
17 provided, and who was present while the statements was taken.  
18 Nothing more, nothing less.

19 IT IS SO ORDERED.

20 Dated this 10th day of September, 2012.

21 /s/ Dennis J. Hubel

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23 DENNIS J. HUBEL  
24 United States Magistrate Judge  
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